

1  
2 Lawrence S. Lustberg, Esq.  
3 GIBBONS P.C.  
4 One Gateway Center  
5 Newark, New Jersey 07102  
6 (973) 596-4500  
7 llustberg@gibbonslaw.com

8  
9  
10 *Attorneys for Amicus Curiae*  
11 *Everytown for Gun Safety*

12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28  
UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF NEW JERSEY

ASSOCIATION OF NEW JERSEY RIFLE AND  
PISTOL CLUBS, INC., et al.,

No. 18-cv-10507

Plaintiffs,

- v. -

GURBIR GREWAL, in his official capacity as  
Attorney General of New Jersey, et al.,

Defendants.

**BRIEF OF AMICUS CURIAE  
EVERYTOWN FOR GUN SAFETY  
IN SUPPORT OF DEFENDANTS'  
OPPOSITION TO PLAINTIFFS'  
MOTION FOR A PRELIMINARY  
INJUNCTION**

**TABLE OF CONTENTS**

	<b>Page</b>
3 TABLE OF AUTHORITIES .....	ii
4 INTEREST OF AMICUS CURIAE .....	1
5 INTRODUCTION.....	1
6 ARGUMENT .....	4
8     I.    New Jersey's Prohibition of Large-Capacity Magazines Is Part of a 9            Longstanding History of Identical and Analogous Prohibitions.....	4
10        A.    There Is a Longstanding Tradition of Prohibiting Firearms Capable 11            of Quickly Firing Multiple Rounds Without Reloading.....	5
12        B.    A2761 Is Consistent with Centuries of Laws Prohibiting 13            Weapons Deemed to Be Especially Dangerous.....	7
14        II.   The "Common Use" Test Proposed By Plaintiffs Is Illogical and Should 15            Not Be Followed.....	9
16        III.   Use of Large Capacity Magazines Makes Mass Shootings and Other 17            Incidents of Gun Violence Deadlier. ....	12
18            a.    Everytown's Analysis of Mass Shootings Shows that the Use of 19              LCMs Results in More Deaths and More Injuries.....	12
20            b.    Social Science Research Shows LCMs Pose a Serious Risk to 21              Public Safety.....	14
22            c.    Plaintiffs' Attempts to Dispute this Evidence Are Unconvincing.....	17
23 CONCLUSION.....	21
24	
25	
26	
27	
28	

## **TABLE OF AUTHORITIES**

Page(s)	
2	<b>Cases</b>
4	<i>Aymette v. State</i> , 21 Tenn. 154 (1840).....8
5	
6	<i>Benjamin v. Bailey</i> , No. CV 93-0063723, (Conn. Super. Ct. June 30, 1994), aff'd, 662 A.2d 1226 (Conn. 1995) .....18
7	
8	<i>Binderup v. Attorney General</i> , 836 F.3d 336 (3d Cir. 2016).....2
9	
10	<i>City of Renton v. Playtime Theatres, Inc.</i> 475 U.S. 41 (1986).....11
11	
12	<i>Cockrum v. State</i> , 24 Tex. 394 (1859).....8
13	
14	<i>Colo. Outfitters Ass'n v. Hickenlooper</i> , 24 F. Supp. 3d 1050, 1071 (D. Colo. 2014), <i>vacated on standing grounds</i> , 823 F.3d 537 (10th Cir. 2016) .....19
15	
16	<i>District of Columbia v. Heller</i> , 554 U.S. 570 (2008)..... <i>passim</i>
17	
18	<i>Drake v. Filko</i> , 724 F.3d 426 (3d Cir. 2013).....7
19	
20	<i>Duncan v. Becerra</i> , 265 F. Supp. 3d 1106, 1139 (S.D. Cal. 2017), <i>appeal docketed</i> , No. 17-56081 (9th Cir., oral argument May 14, 2018) .....2
21	
22	<i>Duncan v. Becerra</i> , No. 17-56081 (9th Cir. Nov. 22, 2017).....1
23	
24	<i>Duncan v. Becerra</i> , No. 17-cv-1017-BEN-JLB (S.D. Cal. June 5, 2017) .....19
25	
26	<i>Friedman v. City of Highland Park</i> , 784 F.3d 406 (7th Cir. 2015), <i>cert. denied</i> , 136 S. Ct. 447 (2015)..... <i>passim</i>
27	
28	<i>Fyock v. City of Sunnyvale</i> , 779 F.3d 991 (9th Cir. 2015) .....2, 4
29	
30	<i>Heller v. District of Columbia</i> , 670 F.3d 1244 (D.C. Cir. 2011) .....2, 19

1	
2	<i>Jackson v. City &amp; Cty. of San Francisco</i> , 746 F.3d 953 (9th Cir. 2014) .....11
3	
4	<i>Kolbe v. Hogan</i> , 849 F.3d 114 (4th Cir. 2017) ( <i>en banc</i> ), <i>cert. denied</i> , 138 S. Ct. 469 (2017)..... <i>passim</i>
5	
6	<i>Kolbe v. Hogan</i> , No. 14-1945, 2016 WL 1572325 (4th Cir. April 18, 2016) .....1, 11
7	
8	<i>McDonald v. City of Chicago</i> , 561 U.S. 742 (2010).....8
9	
10	<i>N.Y. State Rifle &amp; Pistol Ass'n v. Cuomo</i> , 804 F.3d 242 (2d Cir. 2015), <i>cert. denied sub nom. Shew v. Malloy</i> , 136 S. Ct. 2486 (2016) .....2, 11
11	
12	<i>Nat'l Rifle Ass'n of Am. v. Bureau of Alcohol, Tobacco, Firearms &amp; Explosives</i> , 700 F.3d 185 (5th Cir. 2012) .....4
13	
14	<i>Peruta v. Cty. of San Diego</i> , Nos. 10-56971, 11-16255, 2015 WL 2064206 (9th Cir. Apr. 30, 2015) .....1
15	
16	<i>Reilly v. City of Harrisburg</i> , 858 F.3d 173 (3d Cir. 2017).....3
17	
18	<i>United States v. Chester</i> , 628 F.3d 673 (4th Cir. 2010) .....4
19	
20	<i>United States v. Marzzarella</i> , 614 F.3d 85 (3d. Cir. 2010).....2, 4, 5
21	
22	<i>United States v. Miller</i> , 307 U.S. 174 (1939).....7, 8
23	
24	<i>United States v. Skoien</i> , 614 F.3d 638 (7th Cir. 2010) .....4
25	
26	<i>Wiese v. Becerra</i> , 263 F. Supp. 3d 986 (E.D. Cal. 2018).....3
27	
28	<i>Worman v. Healey</i> , 2018 U.S. Dist. LEXIS 59357 (D. Mass. 2018) .....9, 11
29	
30	<b>Statutes</b>
31	
32	New Jersey A2761, tentatively codified at N.J.S.A. 2C:39-1(y) and 39-3(j) ..... <i>passim</i>
33	
34	1837 Ala. Laws 7, § 1 .....8
35	
36	1881 Ark. Acts § 1909 .....8
37	
38	1917 Cal. Stat. 221, ch. 145, § 1 .....8

1	
2	1933 Cal. Stat. 1170, § 3.....6
3	1837 Ga. Laws 90 .....8
4	1931 Ill. Laws 452, § 1 .....6
5	1913 Iowa Acts 307, ch. 297, § 2 .....8
6	1932 La. Acts 337, § 1 .....6
7	1926 Mass. Acts 256, ch. 261 .....8
8	1909 Me. Laws 141.....8
9	1927 Mich. Pub. Acts 887-89, § 3 .....8
10	1927 Mich. Pub. Acts 887, No. 372, § 3.....8
11	1927 Mich. Pub. Acts 887, § 3.....5
12	1913 Minn. Laws 55 .....8
13	1917 Minn. Laws 614, ch. 243, § 1 .....8
14	1933 Minn. Laws 232, § 1 .....6
15	1763-1775 N.J. Laws 346 .....7
16	1911 N.Y. Laws 442, ch. 195, § 1 .....8
17	1916 N.Y. Laws 338-39, ch. 137, § 1 .....8
18	1933 Ohio Laws 189, § 1 .....6
19	1927 R.I. Pub. Laws 256, § 1.....8
20	1927 R.I. Pub. Laws 256, §§ 1, 4.....5
21	1903 S.C. Acts 127, § 1 .....8
22	1934 S.C. Acts 1288, § 1 .....6
23	47 Stat. 650, ch. 465, §§ 1, 14 (1932).....6
24	48 Stat. 1236, 1246 (1934).....7
25	1837-1838 Tenn. Pub. Acts 200 .....8
26	1879 Tenn. Pub. Acts 135, ch. 96, § 1 .....8
27	1933 Tex. Gen. Laws 219, § 1 .....6
28	1912 Vt. Acts & Resolves 310, § 1.....8

1  
2 **Other Authorities**

3 Alan Blinder,

4       *'I Just Wanted to Live,' Says Man Who Wrested Rifle From Waffle House*  
5       *Gunman*, N.Y. Times, April 23, 2018, available at <https://nyti.ms/2I03Cxs>.....20

6 Alana Abramson,

7       *After Newtown, Schools Across the Country Crack Down on Security*, ABC  
8       News (Aug. 21, 2013), <http://abcn.ws/1KwN9Ls>.....14

9 Anna Merriman,

10       *Bystander Killed in Trenton Standoff was Father of 6, Beloved Husband*,  
11       NJ.com (May 11, 2017), available at <https://bit.ly/2tSKVpL>.....17

12 Bart Jansen,

13       *Florida shooting suspect bought gun legally, authorities say*, USA Today.com  
14       (Feb. 15, 2018), <https://usat.ly/2F9kBfH>.....14

15 Brian Freskos,

16       *Baltimore Police Are Recovering More Guns Loaded With High-Capacity*  
17       *Magazines, Despite Ban on Sales*, The Trace (March 27, 2017),  
18       <http://bit.ly/2o1UQrr>.....15

19 Christopher Koper, Daniel Woods &amp; Jeffrey Roth,

20       *An Updated Assessment of the Federal Assault Weapons Ban: Impacts on*  
21       *Gun Markets and Gun Violence, 1994-2003*, National Institute of Justice  
22       (2004), <http://bit.ly/2vBTGTX>.....15, 16

23 Christopher S. Koper et al.,

24       *Criminal Use of Assault Weapons and High-Capacity Semiautomatic*  
25       *Firearms: an Updated Examination of Local and National Sources*, 95 J. Urb.  
26       Health 313 (Oct. 2017), available at <https://bit.ly/2MRVqkd>.....15, 17

27 Cody J. Jacobs,

28       *End the Popularity Contest: A Proposal for Second Amendment "Type of*  
29       *Weapon" Analysis*, 83 Tenn. L. Rev. 231 (2015).....1030 *Congresswoman's Responses after Arizona Shooting Called Encouraging*,31 CNN.com, Jan. 9, 2011, available at <https://cnn.it/2NrEiD0>.....20

32 Dan Ivers,

33       *Car Wash Employee Killed by Stray Bullet in Newark; Two Others Injured*,  
34       NJ.com (Oct. 12, 2014), available at <https://bit.ly/2KJFoeP>.....17

35 Daniel W. Webster et al.,

36       *Epidemiologic changes in gunshot wounds in Washington, D.C. 1983-1990*,  
37       127 Archives of Surgery 694 (1992) .....

38 16

39 David Fallis,

40       *Data Indicate Drop in High Capacity Magazines During Federal Gun Ban*,  
41 Washington Post, (Jan. 10, 2013), <http://wapo.st/2wV9EMX>.....15

1		
2	David Hemenway, <i>Private Guns, Public Health</i> 66-68 (2004).....	18
3		
4	Everytown for Gun Safety, <i>Mass Shootings in the United States: 2009-2016</i> (March 2017) available at <a href="https://every.tw/2BvFkXr">https://every.tw/2BvFkXr</a> .....	12, 13
5		
6	Frank Iannamico, <i>Design and Development of the U.S. Carbine Thirty Round Magazine</i> , Small Arms Review (May 13, 2013) .....	14
7		
8	Garen J. Wintemute, <i>et al.</i> , <i>Criminal Activity and Assault-Type Handguns: A Study of Young Adults</i> , 32 Annals Emer. Med. 44 (1998), available at <a href="http://bit.ly/2ymFodM">http://bit.ly/2ymFodM</a> .....	17
9		
10	Jackie Valley, <i>et al.</i> , <i>No Clear Motive in Las Vegas Strip Shooting That Killed 59, Injured 527</i> , Nevada Independent (Oct. 2, 2017), <a href="http://bit.ly/2x4m4is">http://bit.ly/2x4m4is</a> .....	13
11		
12	Jason Hanna & Holly Yan, <i>Sutherland Springs church shooting: What we know</i> , CNN.com (Nov. 7, 2017) .....	14
13		
14	Jeffrey Roth & Christopher Koper, <i>Impact Evaluation of the Public Safety and Recreational Firearms Use Protection Act of 1994: Final Report</i> , Urban Institute, (1997), available at <a href="http://urbn.is/2wQKkrA">http://urbn.is/2wQKkrA</a> .....	16
15		
16	Joseph Blocher & Darrell A.H. Miller, <i>Lethality, Public Carry, and Adequate Alternatives</i> , 53 Harv. J. on Legis. 279, 288 (2016).....	9
17		
18	Justin George, <i>Shoot to Kill: Why Baltimore is One of The Most Lethal Cities in America</i> , Baltimore Sun (Sept. 30, 2016) .....	16
19		
20	Kelsey Mallahan, <i>Timeline: Seattle Pacific University Shooting</i> , K5 News, June 24, 2016, available at <a href="https://kng5.tv/2m22501">https://kng5.tv/2m22501</a> .....	20
21		
22	Mike McIntire, <i>Weapons in San Bernardino Shootings Were Legally Obtained</i> , New York Times (Dec. 3, 2015), <a href="https://nyti.ms/2JPLR4F">https://nyti.ms/2JPLR4F</a> .....	16
23		
24	Kristina Davis, <i>Las Vegas Mass Shooting Revives Debate on High-Capacity Magazines</i> , San Diego Tribune (Oct. 7, 2017) available at <a href="https://bit.ly/2KshdlQ">https://bit.ly/2KshdlQ</a> .....	2
25		
26	Lia Eustachewich & Danika Fears, <i>Las Vegas Shooter Had Cache of Weapons in Hotel Room</i> , New York Post (October 2, 2017) .....	13
27		
28		

1		
2	Lois Beckett,	
3	<i>Meet America's Gun Super-Owners—With An Average of 17 Firearms Each,</i>	
4	The Trace (Sept. 20, 2016), available at <a href="http://bit.ly/2d89dGH">http://bit.ly/2d89dGH</a> .....	10
5	Louis Klarevas,	
6	<i>Rampage Nation: Securing America from Mass Shootings</i> 221 (2016) .....	13
7	Mayors Against Illegal Guns,	
8	<i>Analysis of Recent Mass Shootings</i> (Sept. 2013). available at	
9	<a href="https://bit.ly/R5K9zi">https://bit.ly/R5K9zi</a> .....	13
10	Myles Ma & Erin O'Neill,	
11	<i>Toddler was Bouncing on Parent's Bed When Killed by Stray Bullet Fired in Shootout</i> , NJ.com (Oct 13, 2014), available at <a href="https://bit.ly/2KMc9Iw">https://bit.ly/2KMc9Iw</a> .....	17
12	National Rifle Association (@NRA),	
13	Twitter (June 28, 2018, 10:07 AM), <a href="https://bit.ly/2tZzBr9">https://bit.ly/2tZzBr9</a> .....	18
14	Nicholas Nehamas & David Smiley,	
15	<i>Florida School Shooter's AR-15 May Have Jammed, Saving Lives, Report Says</i> , Miami Herald (Feb. 27, 2018), <a href="https://hrld.us/2KQskUU">https://hrld.us/2KQskUU</a> .....	14
16	O. Ricardo Pimentel,	
17	<i>Nearly 50 Years Ago, Bravery at UT tower</i> (June 19, 2016), MySA.com,	
18	<a href="https://bit.ly/2JAqu7s">https://bit.ly/2JAqu7s</a> ;.....	14
19	Paula McMahon,	
20	<i>Nikolas Cruz left 180 rounds of ammunition – with swastikas – at Parkland school, sources say</i> , Sun Sentinel (Mar. 2, 2018), <a href="https://bit.ly/2lVjY09">https://bit.ly/2lVjY09</a> .....	14
21	Philip Cook, Jens Ludwig & David Hemenway,	
22	<i>The Gun Debate's New Mythical Number: How Many Self-Defense Uses Per Year?</i> , 16 J. Pol'y Analysis & Mgmt. 43 (2007) .....	18
23	Rachael Rettner,	
24	<i>Gunshot Wounds Are Getting Deadlier, One Hospital Finds</i> ,	
25	LiveScience.com, June 14, 2016, <a href="https://bit.ly/2HBnMO9">https://bit.ly/2HBnMO9</a> .....	16
26	Robert J. Spitzer,	
27	<i>Gun Law History in the United States and Second Amendment Rights</i> , 80 Law & Contemp. Probs. 55 (2017) .....	5
28	Robert Johnson & Geoffrey Ingersoll,	
29	<i>It's Incredible How Much Guns Have Advanced Since the Second Amendment</i> , Business Insider: Military & Defense (Dec. 17, 2012), available at <a href="http://read.bi/2x12PpU">http://read.bi/2x12PpU</a> .....	5
30	S. Rep. No. 72-575 (1932) .....	6

1	
2	Sam Petulla, <i>Here is 1 Correlation Between State Gun Laws and Mass Shootings</i> , CNN.com (Oct. 5, 2017), <a href="https://cnn.it/2J4sWCC">https://cnn.it/2J4sWCC</a> .....15
3	
4	United States Census Bureau, 2010 Census: Population Density Data, <i>available at</i> <a href="https://bit.ly/2z5jPRx">https://bit.ly/2z5jPRx</a> .....17
5	
6	Violence Policy Center, <i>Firearm Justifiable Homicides and Non-Fatal Self-Defense Gun Use</i> (June 2015) .....18
7	
8	Violence Policy Center, <i>High Capacity Ammunition Magazines are the Common Thread Running</i> <i>Through Most Mass Shootings in the United States</i> , <a href="https://bit.ly/2HnPC0k">https://bit.ly/2HnPC0k</a> .....14
9	
10	Violence Policy Center, <i>Firearm Justifiable Homicide and Non-Fatal Self-Defense Gun Use: An</i> <i>Analysis of Federal Bureau of Investigation and National Crime Victimization</i> <i>Survey Data</i> (May 2017), <i>available at</i> <a href="https://bit.ly/2KAB0Qa">https://bit.ly/2KAB0Qa</a> .....18
11	
12	
13	
14	
15	
16	
17	
18	
19	
20	
21	
22	
23	
24	
25	
26	
27	
28	

## INTEREST OF AMICUS CURIAE

Everytown for Gun Safety is the nation's largest gun-violence-prevention organization, with millions of supporters spread across all fifty states, including tens of thousands of New Jersey residents. It was founded in 2014 as the combined effort of Mayors Against Illegal Guns, a national, bipartisan coalition of mayors combating illegal guns and gun trafficking, and Moms Demand Action for Gun Sense in America, an organization formed after the murder of twenty children and six adults in an elementary school in Newtown, Connecticut. Currently, the mayors of 100 New Jersey cities are members of Mayors Against Illegal Guns. Everytown also includes a large network of gun violence survivors who are empowered to share their stories and advocate for responsible gun laws.

Everytown’s mission includes defending gun laws through the filing of *amicus* briefs that provide historical context and doctrinal analysis which might otherwise be overlooked. Everytown has filed such briefs in several recent cases, including in cases, like this one, involving challenges to laws regulating large-capacity ammunition magazines. *See, e.g., Kolbe v. Hogan*, No. 14-1945, 2016 WL 1572325 (4th Cir. April 18, 2016); *Peruta v. Cty. of San Diego*, Nos. 10-56971, 11-16255, 2015 WL 2064206 (9th Cir. Apr. 30, 2015); *Duncan v. Becerra*, No. 17-56081 (9th Cir. Nov. 22, 2017).

## INTRODUCTION

This case concerns New Jersey residents' right to be free from gun violence and their power to enact laws to protect that right. In light of the increasing toll of mass shootings, and in response to recent gun massacres in Aurora, Colorado; Newtown, Connecticut; San Bernardino, California; Las Vegas, Nevada; Sutherland Springs, Texas, and Parkland, Florida, among other places, the people of New Jersey sought legislation that would limit their risk of dying in one of these horrific crimes. Their efforts resulted in Assembly Bill No. A2761 (hereinafter, "A2761"), which amends the New Jersey criminal code to prohibit the sale or possession of large-capacity magazines ("LCMs") capable of holding more than ten rounds of ammunition, of the type used

1  
2 in these and other recent mass shootings.<sup>1</sup> Every federal court of appeals that has considered this  
3 issue has found that such prohibitions on LCMs are permissible under the Second Amendment.<sup>2</sup>  
4 But Plaintiffs barely mention this overwhelming precedent in their motion papers, instead  
5 arguing that their Second Amendment claims are likely to succeed because, they assert, laws  
6 regulating ammunition capacity are not longstanding, LCMs are widely owned, and social  
7 science does not support the restrictions at issue. As both the State's brief and this *amicus* brief  
8 show, Plaintiffs' arguments are without merit. This Court should thus reach the same conclusion  
9 as the Second, Fourth, Seventh, Ninth, and D.C. Circuits and reject them—and accordingly deny  
10 Plaintiffs' Motion for a Preliminary Injunction.<sup>3</sup>

11 Courts in this Circuit analyze Second Amendment challenges through a “two-pronged  
12 approach”: first, by assessing “whether the challenged law imposes a burden on conduct falling  
13 within the scope of the Second Amendment’s guarantee,” and then, if it does, by “evaluat[ing]  
14 the law under some form of means-ends scrutiny,” generally intermediate scrutiny. *Binderup v.*  
15 *Attorney General*, 836 F.3d 336, 346, 397 (3d Cir. 2016) (*en banc*) (quoting *United States v.*  
16

17  
18 <sup>1</sup> See e.g. Kristina Davis, *Las Vegas Mass Shooting Revives Debate on High-Capacity*  
19 *Magazines*, San Diego Tribune (Oct. 7, 2017) available at <https://bit.ly/2KshdlQ>; Mike McIntire,  
20 *Weapons in San Bernardino Shootings Were Legally Obtained*, New York Times (Dec. 3, 2015),  
<https://nyti.ms/2JPLR4F>; A2761 is tentatively codified at N.J.S.A. 2C:39-1(y) and 39-3(j).

21 <sup>2</sup> See *Kolbe v. Hogan*, 849 F.3d 114, 137-38 (4th Cir. 2017) (*en banc*) (affirming the finding that  
22 Maryland’s ban on LCMs over ten rounds was constitutional and holding that such magazines  
23 were not protected by the Second Amendment), *cert. denied*, 138 S. Ct. 469 (2017); *N.Y. State*  
24 *Rifle & Pistol Ass’n v. Cuomo*, 804 F.3d 242, 247 (2d Cir. 2015) (hereinafter, “NYSRPA”)  
25 (holding that New York and Connecticut prohibitions on possessing LCMs holding over ten  
26 rounds did not violate the Second Amendment), *cert. denied sub nom. Shew v. Malloy*, 136 S. Ct.  
27 2486 (2016); *Friedman v. City of Highland Park*, 784 F.3d 406, 412 (7th Cir. 2015) (holding that  
28 local ordinance banning LCMs did not violate the Second Amendment), *cert. denied*, 136 S. Ct.  
447 (2015); *Fyock v. City of Sunnyvale*, 779 F.3d 991, 1001 (9th Cir. 2015) (upholding denial of  
preliminary injunction of local ordinance restricting the possession of LCMs accepting more than  
ten rounds); *Heller v. District of Columbia*, 670 F.3d 1244, 1264 (D.C. Cir. 2011) (upholding  
D.C. prohibition on LCMs over ten rounds). *But see Duncan v. Becerra*, 265 F. Supp. 3d 1106,  
1139 (S.D. Cal. 2017) (granting preliminary injunction against California’s ban on LCMs over  
ten rounds), *appeal docketed*, No. 17-56081 (9th Cir., oral argument May 14, 2018).

<sup>3</sup> This *amicus* brief addresses only Plaintiffs’ Second Amendment claims, and in particular  
Plaintiffs’ failure to demonstrate their likelihood of success on those claims. Plaintiffs’ motion  
for a preliminary injunction with respect to their Equal Protection and Takings Clause claims  
should also be denied, for the reasons set forth by the State.

1  
2 *Marzzarella*, 614 F.3d 85, 89 (3d. Cir. 2010) (internal quotation marks omitted).<sup>4</sup> A2761 passes  
3 muster at both steps of this analysis, clearly showing that, as the State argues, (Def.’s Br. at \*18-  
4 27), Plaintiffs are highly unlikely to succeed on the merits of their claims.<sup>5</sup>

5 As an initial matter, A2761 is part of a long tradition of regulating or prohibiting weapons  
6 that legislatures have determined to be unacceptably dangerous—including a century of  
7 restrictions on firearms capable of firing a large number of rounds without reloading. This  
8 historical tradition alone is sufficient for this Court to find A2761 constitutional under *District of*  
9 *Columbia v. Heller*, 554 U.S. 570, 626-27 (2008) (noting “the historical tradition of prohibiting  
10 the carrying of ‘dangerous and unusual weapons,’” and that “nothing in its opinion should be  
11 taken to cast doubt on longstanding prohibitions”).

12 The Court should also reject Plaintiffs’ argument that the national prevalence of a firearm  
13 feature, like the LCMs at issue here, somehow gives that feature Second Amendment protection.  
14 Such an approach cannot, for the reasons set forth herein, be reconciled with the Second  
15 Amendment exceptions articulated by the Supreme Court in *Heller* and by those circuits that  
16 have addressed this issue. *See, e.g., id.* at 626-627 (recognizing that the Second Amendment is  
17 “not a right to keep and carry any weapon whatsoever” and “M-16 rifles and the like—may be  
18 banned”); *Kolbe*, 849 F.3d at 121 (holding that LCMs “are among those arms . . . the *Heller*  
19 Court singled out as being beyond the Second Amendment’s reach”); *Friedman*, 784 F.3d at 408  
20 (noting that under *Heller*, the Second Amendment does not protect “military-grade weapons . . .  
21 and weapons especially attractive to criminals”). Moreover, the “common use” test would  
22 transform the constitutional analysis into a consumer referendum and render existing firearms  
23 and firearm features like LCMs effectively immune from regulation.

24  
25 

---

<sup>4</sup> Every court that has confronted a Second Amendment challenge to LCM regulations has  
26 applied such intermediate scrutiny. *See Wiese v. Becerra*, 263 F. Supp. 3d 986, 992 (E.D. Cal.  
27 2018) (“[V]irtually every other court to examine large capacity magazine bans has found that  
intermediate scrutiny is appropriate”).

28 <sup>5</sup> To obtain a preliminary injunction Plaintiffs must show (1) a reasonable probability of success  
in the litigation, and (2) irreparable injury if relief is not granted. *E.g., Reilly v. City of*  
*Harrisburg*, 858 F.3d 173, 176 (3d Cir. 2017). The court should also take into account the  
possibility of harm to other interested persons, and the public interest. *Id.* This brief focuses on  
Plaintiffs’ likelihood of success on the merits but as discussed below and in the State’s brief,  
these additional factors also weigh heavily in favor of denying Plaintiffs’ motion.

1  
2 To the extent that the Court engages in the second step of the Second Amendment  
3 analysis, applying intermediate scrutiny, it also strongly supports the constitutionality of A2761.  
4 As discussed below, social science research conducted by Everytown, as well as other relevant  
5 social science, demonstrates that LCMs make mass shootings more deadly and supports the  
6 reasonable fit of A2761 to addressing New Jersey residents' public safety concerns.  
7

## ARGUMENT

8 **I. New Jersey's Prohibition of Large-Capacity Magazines Is Part of a  
9 Longstanding History of Identical and Analogous Prohibitions.**

10 As both the Supreme Court and the Third Circuit have emphasized, "longstanding  
11 limitations are exceptions to the right to bear arms." *Marzzarella*, 614 F.3d at 91; *see Heller*, 554  
12 U.S. at 626-27, 635 (noting that such "longstanding" regulations are treated as tradition-based  
13 "exceptions" by virtue of their "historical justifications").<sup>6</sup> That said, such longstanding  
14 prohibitions need not "mirror limits that were on the books in 1791." *United States v. Skoien*,  
15 614 F.3d 638, 641 (7th Cir. 2010) (*en banc*). Instead, courts have found that even "early  
16 twentieth century regulations might nevertheless demonstrate a history of longstanding  
17 regulation if their historical prevalence and significance is properly developed in the record."  
18 *Fyock*, 779 F.3d at 997 (citing *Nat'l Rifle Ass'n of Am. v. Bureau of Alcohol, Tobacco, Firearms*  
19 & Explosives, 700 F.3d 185, 196 (5th Cir. 2012)).<sup>7</sup>

20 A2761 is part of a long tradition of regulating or prohibiting weapons that lawmakers  
21 have determined to be unacceptably dangerous—including a century of restrictions enacted  
22 shortly after semi-automatic weapons capable of firing a large number of rounds without  
23

---

24 <sup>6</sup> *See also Fyock*, 779 F.3d at 997 (noting that "longstanding prohibitions" are "traditionally  
25 understood to be outside the scope of the Second Amendment"); *United States v. Chester*, 628  
26 F.3d 673, 680 (4th Cir. 2010) (noting that a law does not violate the Second Amendment if it  
does not infringe upon "conduct that was within the scope of the Second Amendment as  
historically understood").

27 <sup>7</sup> *See also Friedman*, 784 F.3d at 408 (noting that "*Heller* deemed a ban on private possession of  
28 machine guns to be obviously valid" despite the fact that "states didn't begin to regulate private  
use of machine guns until 1927," and that "regulating machine guns at the federal level" did not  
begin until 1934); *Skoien*, 614 F.3d at 639-41 (noting that "prohibitions on the possession of  
firearms by felons and the mentally ill" have been found to be sufficiently longstanding, despite  
the fact that "[t]he first federal statute disqualifying felons from possessing firearms was not  
enacted until 1938" and that "the ban on possession by *all* felons was not enacted until 1961").

reloading became widely commercially available. *See* Robert J. Spitzer, *Gun Law History in the United States and Second Amendment Rights*, 80 Law & Contemp. Probs. 55, 68-69 (2017) (explaining that “[firearm] laws were enacted not when these weapons were invented, but when they began to circulate widely in society”). Many of these laws were passed at about the same time as the prohibitions on sales to felons and the mentally ill and restrictions on commercial sale of arms which the Supreme Court in *Heller* identified as longstanding. *See id.* at 82 (discussing the passage of prohibitions on possession of firearms by felons and the mentally ill in the early 20th century and on the possession of semi-automatic weapons with LCMs in the 1920s and 1930s). This historical tradition alone is sufficient for the Court to find A2761 constitutional under *Heller*. *See Heller*, 554 U.S. at 626-27; *Marzzarella*, 614 F.3d at 91-92.

**A. There Is a Longstanding Tradition of Prohibiting Firearms Capable of Quickly Firing Multiple Rounds Without Reloading.**

Even more specifically, states have regulated the ammunition capacity of semi-automatic firearms since they first became widely commercially available at the turn of the twentieth century. *See* Robert Johnson & Geoffrey Ingersoll, *It's Incredible How Much Guns Have Advanced Since the Second Amendment*, Business Insider: Military & Defense (Dec. 17, 2012), *available at* <http://read.bi/2x12PpU> (explaining that semi-automatic weapons became commercially available in the early 1900s). Such laws often categorized large-capacity, semi-automatic firearms, along with fully automatic weapons, as “machine guns,” and imposed restrictions that effectively prohibited them entirely. *See, e.g.*, 1927 R.I. Pub. Laws 256, §§ 1, 4 (prohibiting the “manufacture, s[ale], purchase or possess[ion]” of a “machine gun,” which it defined as “any weapon which shoots more than twelve shots semi-automatically without reloading”); 1927 Mich. Pub. Acts 887, § 3 (prohibiting possession of “any machine gun or firearm which can be fired more than sixteen times without reloading”).

In 1928, the National Conference on Uniform State Laws (now the Uniform Law Commission) adopted a model law prohibiting possession of “any firearm which shoots more than twelve shots semi-automatically without reloading,” setting the national standard for laws prohibiting possession of semi-automatic firearms with large magazine capacities. *See* Report of Firearms Committee, 38th Conference Handbook of the National Conference on Uniform State

Laws and Proceedings of the Annual Meeting 422-23 (1928).<sup>8</sup> Shortly thereafter, the federal government enacted a similar prohibition for the District of Columbia. *See* 47 Stat. 650, ch. 465, §§ 1, 14 (1932) (making it a crime to “possess any machine gun,” which it defined as “any firearm which shoots . . . semiautomatically more than twelve shots without loading”). Ironically, the National Rifle Association, the parent organization of the plaintiffs in this case, endorsed passage of the D.C. law, saying, “it is our desire [that] this legislation be enacted for the District of Columbia, in which case it can then be used as a guide throughout the states of the Union.” S. Rep. No. 72-575, at 5-6 (1932).

Many states followed the federal government’s lead, prohibiting or regulating firearms based on magazine capacity. California, for example, prohibited the sale or possession of not only “all firearms . . . capable of discharging automatically,” but also “all firearms which are automatically fed after each discharge from or by means of clips, discs, drums, belts or other separable mechanical device *having a capacity of greater than ten cartridges.*” 1933 Cal. Stat. 1170, § 3 (emphasis added).<sup>9</sup> Several other states, including Minnesota, Ohio, and Virginia, also prohibited or regulated firearms based on magazine capacity.<sup>10</sup> Still other states passed laws limiting possession of automatic weapons based on the number of rounds that a firearm could discharge without reloading.<sup>11</sup>

---

<sup>8</sup> This standard originated with a model law promulgated by the National Crime Commission in 1927. *Report of Firearms Committee*, at 422-23.

<sup>9</sup> These statutes were at least as restrictive as A2761, and indeed appear more restrictive: the 1933 law prohibited *firearms* capable of receiving LCMs, rather than only the LCMs at issue here. *See id.*

<sup>10</sup> *See* 1933 Minn. Laws 232, § 1 (banning “[a]ny firearm capable of automatically reloading after each shot is fired, whether firing singly by separate trigger pressure or firing continuously” if the weapon was modified to allow for a larger magazine capacity); 1933 Ohio Laws 189, § 1 (banning “any firearm which shoots more than eighteen shots semi-automatically without reloading”); 1934 Va. Acts 137, § 1 (effectively prohibiting possession or use of “weapons . . . from which more than sixteen shots or bullets may be rapidly, automatically, semi-automatically or otherwise discharged without reloading”).

<sup>11</sup> These limitations were more stringent than New Jersey’s current magazine prohibition of ten rounds. *See* 1933 S.D. Sess. Laws 245, § 1 (five rounds); 1933 Tex. Gen. Laws 219, § 1 (five rounds); 1934 Va. Acts 137, § 1 (seven rounds for automatics, 16 for semi-automatics); 1931 Ill. Laws 452, § 1 (eight rounds); 1932 La. Acts 337, § 1 (eight rounds); 1934 S.C. Acts 1288, § 1 (eight rounds).

1  
2        The federal government embraced such regulations in 1934 when Congress enacted the  
3        National Firearms Act. *See* 48 Stat. 1236, 1246 (1934) (requiring registration of automatic  
4        weapons, short-barreled rifles and shotguns, and a variety of concealable and disguised firearms,  
5        and imposing a significant transfer tax on these weapons). And the Supreme Court unanimously  
6        upheld the National Firearms Act in one of its few pre-*Heller* Second Amendment decisions.  
7        *See United States v. Miller*, 307 U.S. 174, 178 (1939) (affirming that the Second Amendment  
8        does not guarantee the right to keep and bear short-barreled shotguns).

9        As this historical record shows, A2761 is thus properly viewed as the continuation of  
10       nearly a century of valid restrictions based on the ability to shoot large numbers of rounds in a  
11       short time without reloading. As such, the statute is a longstanding restriction, which  
12       accordingly falls outside the scope of the Second Amendment. *See Drake v. Filko*, 724 F.3d 426,  
13       432 (3d Cir. 2013) (finding that concealed-carry licensing standard which had been in effect “in  
14       some form for nearly 90 years,” “qualifies as a longstanding, presumptively lawful regulation”  
15       (internal quotation marks omitted)).

16       **B.       A2761 Is Consistent with Centuries of Laws Prohibiting Weapons Deemed to  
17       Be Especially Dangerous.**

18       A2761 is also part of a long history of government prohibition of weapons that pose  
19       heightened threats to public safety, either because the weapons themselves are particularly lethal  
20       or because they are especially suitable for criminal use. In particular, prohibitions on weapons  
21       deemed to be especially dangerous date back to early English legal history, beginning with the  
22       1383 prohibition of lancegays (a particularly lethal type of spear) and the 1541 prohibition of  
23       crossbows and firearms less than a yard long. *See* 7 Ric. 2, 35, ch. 13 (1383); 33 Hen. 8, ch. 6, §  
24       1 (1541). The regulation of unusually dangerous weapons continued as the American colonies  
25       and first states, including New Jersey, adopted the English tradition. *See generally* 1763-1775  
26       N.J. Laws 346 (prohibiting set or trap guns); The Laws of Plymouth Colony (1671) (same);  
27       Records of the Colony of New Plymouth in New England 230 (Boston 1861) (same).

28       States continued to pass prohibitions or regulations on unreasonably dangerous weapons  
after ratification of the Second Amendment. For example, several states banned or placed

prohibitively high taxes on Bowie knives,<sup>12</sup> the assault weapon of their time, which were determined to be “instrument[s] of almost certain death.” *See Cockrum v. State*, 24 Tex. 394, 402 (1859). In addition, a number of states prohibited certain types of small and easily concealable handguns, which were determined to be ideal for criminal use.<sup>13</sup>

Throughout the early twentieth century, many states passed laws prohibiting unusually dangerous weapons or weapon features, such as silencers, as the technology of firearms and other dangerous weapons evolved.<sup>14</sup> At least 28 states, as well as the federal government, passed prohibitions or severe restrictions on automatic weapons in the 1920s and 1930s, along with the restrictions on large capacity semi-automatic weapons discussed above. *See supra* Part I.A.<sup>15</sup>

Within this historical context, New Jersey’s prohibition on LCMs can be understood as merely the latest part of a longstanding tradition of government prohibition or regulation of

---

<sup>12</sup> *See* 1837 Ala. Laws 7, § 1 (prohibitively taxing Bowie knives); 1837 Ga. Laws 90 (banning Bowie knives); 1837-1838 Tenn. Pub. Acts 200 (prohibiting the sale of Bowie knives); *Aymette v. State*, 21 Tenn. 154, 158 (1840) (justifying a prohibition on Bowie knives on the basis that they are “weapons which are usually employed in private broils, and which are efficient only in the hands of the robber and the assassin”).

<sup>13</sup> *See* 1881 Ark. Acts § 1909 (pocket pistols and “any kind of cartridge[] for any pistol”); 1879 Tenn. Pub. Acts 135, ch. 96, § 1 (“belt or pocket pistols, or revolvers, or any other kind of pistols, except army or navy pistol”); 1907 Ala. Law 80, § 1 (similar); 1903 S.C. Acts 127, § 1 (similar).

<sup>14</sup> *See, e.g.*, 1909 Me. Laws 141 (prohibiting silencers); 1912 Vt. Acts & Resolves 310, § 1 (same); 1913 Minn. Laws 55 (same); 1916 N.Y. Laws 338-39, ch. 137, § 1 (same); 1926 Mass. Acts 256, ch. 261 (same); 1927 Mich. Pub. Acts 887-89, § 3 (same); 1927 R.I. Pub. Laws 256, § 1 (same). States also banned a wide variety of unusually dangerous weapons, including blackjacks and billy clubs, sling-shots (a metal or stone weight tied to a string), brass knuckles, various kinds of knives, and explosives. *See, e.g.*, 1917 Cal. Stat. 221, ch. 145, § 1 (blackjacks and billy clubs); 1911 N.Y. Laws 442, ch. 195, § 1 (sling-shots); 1917 Minn. Laws 614, ch. 243, § 1 (brass knuckles); 1913 Iowa Acts 307, ch. 297, § 2 (daggers and similar-length knives); 1927 Mich. Pub. Acts 887, No. 372, § 3 (explosives).

<sup>15</sup> Plaintiffs point to the failure of the founding generation to pass laws prohibiting experimental, and highly unusual weapons of the era with ammunition capacities of greater than ten rounds. (Pls.’ Mem. at 13.) This argument is foreclosed by the series of Supreme Court decisions, culminating in *Heller*, expressly allowing the regulation and prohibition of automatic weapons and short-barreled shotguns, which had existed, in a much less unusual manner, for decades. *Heller*, 554 U.S. at 627 (allowing for the prohibition of “dangerous and unusual weapons” including “M-16 rifles and the like”); *McDonald v. City of Chicago*, 561 U.S. 742, 786 (2010) (noting that the Second Amendment is “not ‘a right to keep and carry any weapon whatsoever in any manner whatsoever and for whatever purpose.’”); *United States v. Miller*, 307 U.S. 174 (1939) (upholding prohibitive registration requirement for short-barreled shotguns, a weapon that existed at the founding without regulation).

1  
2 unusually dangerous weapons. This long history of analogous regulation further supports the  
3 conclusion that A2761 does not burden a “right secured by the Second Amendment.” *Heller*,  
4 554 U.S. at 626-27.

5 **II. The “Common Use” Test Proposed By Plaintiffs Is Illogical and Should Not Be**  
6 **Followed.**

7 In analyzing this Second Amendment challenge, the Court should reject Plaintiffs’  
8 argument that it should apply a test that focuses on whether the law bans weapons that are “in  
9 common use.” (See Pls.’ Mem. at 10.) Such test is not well grounded in Second Amendment  
10 jurisprudence and does not fully account for important principles of federalism. These flaws  
11 exist whether the test is applied categorically or as a threshold question at step one of the  
12 prevailing Second Amendment analysis. (*Id.* at 18.)

13 The argument that LCMs must be afforded Second Amendment protection because they  
14 are widely available misconstrues the Supreme Court’s decision in *Heller* to suggest that a  
15 product’s significant presence in the national market triggers Second Amendment protection.  
16 The Court in *Heller* held that the Second Amendment “does not protect those weapons not  
17 typically possessed by law-abiding citizens for lawful purposes, such as short-barreled  
18 shotguns.” 554 U.S. at 625. But it does not logically follow, and courts have not found, that the  
19 Second Amendment somehow protects all weapons that have achieved a degree of commercial  
20 success. *See Kolbe*, 849 F.3d at 142 (“The *Heller* majority said nothing to confirm that it was  
21 sponsoring the popularity test.”); *Worman v. Healey*, 2018 U.S. Dist. LEXIS 59357, \*30 (D.  
22 Mass. 2018) (“[P]resent day popularity is not constitutionally material.”).

23 In addition to lacking firm jurisprudential foundation, the “common use” test ultimately  
24 proves hopelessly circular. Following this approach would allow the constitutionality of  
25 weapons prohibitions to be decided not by how dangerous a weapon is, but rather by “how  
26 widely it is circulated to law-abiding citizens by the time a bar on its private possession has been  
27 enacted and challenged.” *Kolbe*, 849 F.3d at 141. Just as “[i]t would be absurd to say that the  
28 reason why a particular weapon can be banned is that there is a statute banning it, so that it isn’t  
commonly owned,” *Friedman*, 784 F.3d at 409, it would be similarly absurd to allow the fact  
that a law previously did not exist to stand as a constitutional bar to its enactment. *See Joseph*

1  
2 Blocher & Darrell A.H. Miller, *Lethality, Public Carry, and Adequate Alternatives*, 53 Harv. J.  
3 on Legis. 279, 288 (2016) (discussing the “central circularity” that plagues the “common use”  
4 test: “what is common depends largely on what is, and has been, subject to regulation”). Yet this  
5 is what application of the “common use” test, advocated by Plaintiffs, would dictate, here and  
6 elsewhere.

7 This approach also fails to provide workable standards, or indeed, any guidance, as to  
8 whether a court should determine “common use” by considering the number of LCMs produced  
9 or sold or the number of law-abiding owners of the same. *See Kolbe*, 849 F.3d at 135-36. This  
10 distinction is critical because firearm ownership is extremely concentrated, with 3% of American  
11 adults possessing 50% of the country’s guns. *See* Lois Beckett, *Meet America’s Gun Super-*  
12 *Owners—With An Average of 17 Firearms Each*, The Trace (Sept. 20, 2016), available at  
13 <http://bit.ly/2d89dGH>. If production or sales numbers form the basis of the common use  
14 analysis, this small group of gun owners would be essentially placed in control of the meaning of  
15 the Second Amendment. But this tyranny by a tiny minority was obviously not what the *Heller*  
16 Court intended.

17 Indeed, a constitutional analysis driven by the prevalence of the prohibited firearm in the  
18 market would create perverse incentives for the firearms industry, giving it the unilateral ability  
19 to provide highly dangerous firearms, and firearm features with Second Amendment protection  
20 “simply by manufacturing and heavily marketing them” before the Government has had the  
21 chance to assess their danger, determine whether to regulate them and build the political  
22 momentum to actually do so. Cody J. Jacobs, *End the Popularity Contest: A Proposal for*  
23 *Second Amendment “Type of Weapon” Analysis*, 83 Tenn. L. Rev. 231, 265 (2015). But the  
24 choices, including the irresponsible choices, of the gun industry cannot and should not define the  
25 meaning of the Second Amendment. *See Kolbe*, 849 F.3d at 141-42 (rejecting such a Second  
26 Amendment test).

27 Such an approach also raises federalism concerns, as states that fail to immediately  
28 regulate new and potentially dangerous firearms or firearm features would risk losing the ability

1  
2 to do so if such firearms or features are quickly adopted by consumers in other states.<sup>16</sup> Thus,  
3 firearm safety decisions made in some states would render the laws of other states “more or less  
4 open to challenge under the Second Amendment,” and “would imply that no jurisdiction other  
5 than the United States as a whole can regulate firearms.” *Friedman*, 784 F.3d at 412. But *Heller*  
6 “does not foreclose all possibility of experimentation” by state and local governments. *Id.*  
7 Directly to the contrary, it permits states and localities to do what they have long done in the  
8 realm of firearm legislation: “experiment with solutions to admittedly serious problems.”  
9 *Jackson v. City & Cty. of San Francisco*, 746 F.3d 953, 966 (9th Cir. 2014) (quoting *City of*  
10 *Renton v. Playtime Theatres, Inc.* 475 U.S. 41, 52 (1986)).

11 This Court should be guided by the Fourth Circuit’s *en banc* opinion in *Kolbe*, as well as  
12 the historical tradition discussed above, and consider whether the firearm, or firearm component,  
13 at issue is appropriate for self-defense or instead is a weapon designed to produce mass  
14 casualties. *See* 849 F.3d at 121. The *Kolbe* court found that “large-capacity magazines . . . [that]  
15 allow a shooter to fire more than ten rounds without having to pause to reload . . . ‘are  
16 particularly designed and most suitable for military and law enforcement applications’ [as they]  
17 enhance a shooter’s capacity to shoot multiple human targets very rapidly.” *Id.* at 125 (internal  
18 citations omitted); *see id.* at 137 (noting that LCMs “are a ‘uniquely military feature[]’”).  
19 “Because . . . large-capacity magazines are clearly most useful in military service,” the *Kolbe*  
20 court held that it was “compelled by *Heller* to recognize that those . . . magazines are not  
21 constitutionally protected.” *Id.* at 137. The same reasoning should apply here. *See Worman*,  
22 2018 U.S. Dist. at \*29 (following *Kolbe*, and holding that “LCMs are most useful in military  
23 service [and therefore] . . . beyond the scope of the Second Amendment”); *see also NYSRPA*, 804  
24 F.3d at 256 (noting that *Heller* permitted the prohibition of military-grade weapons “without  
25 implicating the Second Amendment,” before applying intermediate scrutiny to uphold assault  
26 weapon and LCM prohibitions); *Friedman*, 784 F.3d at 408 (noting that, under *Heller*, the  
27 Second Amendment does not protect “military-grade weapons” or “weapons especially attractive  
28

---

<sup>16</sup> A counterfactual further demonstrates why the “common use” test is inappropriate: if Congress had renewed the federal prohibition on LCMs rather than permitting it to lapse in 2004, the weapons prohibited by A2761 would not be in widespread use today and would therefore not be subject to Second Amendment protection under Plaintiffs’ “common use” theory.

1  
2 to criminals,” before applying intermediate scrutiny to uphold assault weapons and LCM  
3 prohibitions). Accordingly, the Court should find that Plaintiffs are not likely to (and, indeed,  
4 cannot) prevail on their Second Amendment challenge to A2671—and that their preliminary  
5 injunction motion should thus be denied.  
6

7 **III. Use of Large Capacity Magazines Makes Mass Shootings and Other Incidents of  
8 Gun Violence Deadlier.**

9 The use of LCMs, whether in mass shootings or in everyday gun violence, results in more  
10 people being shot, more injuries per victim, and more deaths. Both Everytown’s analysis and the  
11 relevant social science research indicate that the use of LCMs makes shootings more dangerous  
12 and more deadly. The people of New Jersey thus have a strong public interest in reducing the  
13 risk of harm to their citizens by prohibiting the possession and use of LCMs throughout the  
14 State. And A2761 is a reasonably tailored attempt to address this serious public safety concern,  
15 and is thus constitutional, for this reason as well.

16 **a. Everytown’s Analysis of Mass Shootings Shows that the Use of LCMs Results  
17 in More Deaths and More Injuries.**

18 Everytown, like its predecessor organization Mayor’s Against Illegal Guns, has been  
19 tracking and documenting mass shootings since 2013 and has released several reports  
20 summarizing this data.<sup>17</sup> As part of this work, Everytown has attempted to document the  
21 weapons used in mass shootings. Everytown’s researchers have largely relied on press coverage  
22 and FBI data for details regarding individual mass shootings. *See generally* Everytown for Gun  
23 Safety, *Mass Shootings in the United States: 2009-2016* (March 2017) available at  
24 <https://every.tw/2BvFkXr>. But while Everytown’s research cannot present a comprehensive  
25 dataset of the magazines used in every mass shootings—the reality of gun violence and mass  
26 shootings in the United States is that this kind of information is not available in every instance—  
27 the available data indicate that LCMs make shootings significantly more deadly.  
28

---

<sup>17</sup> Everytown’s most recent mass shooting report, *Mass Shootings in the United States: 2009-2016* (Mar. 2017), is available at <https://every.tw/2BvFkXr>.

1  
2 For example, a report on mass shootings issued by Everytown in 2013 shows that, on  
3 average, shooters who use LCMs, or assault weapons (which are typically equipped with LCMs),  
4 shoot more than twice as many victims (151% more) and kill 63% more victims as compared to  
5 other mass shooters. Mayors Against Illegal Guns, *Analysis of Recent Mass Shootings* (Sept.  
6 2013). *available at* <https://bit.ly/R5K9zi>. Data from Everytown's continued tracking of mass  
7 shootings also shows that where assault-style weapons—which, except for in jurisdictions where  
8 they are prohibited, nearly universally come standard with LCMs—are used, an average of twice  
9 as many people are killed (10.1 per shooting vs. 4.9) and more than ten times as many are shot  
10 and injured (11.4 per shooting vs. 1.1) than in shootings in which assault-style weapons are not  
11 used.<sup>18</sup> See Everytown for Gun Safety, Appendix to *Mass Shootings in the United States: 2009-*  
12 *2016* (Apr. 11 2017), <https://every.tw/2JPBIVz>;<sup>19</sup> see also Louis Klarevas, *Rampage Nation:*  
13 *Securing America from Mass Shootings* 221 (2016) (finding the use of LCMs in high casualty  
14 mass shootings increased the death toll by 17%).

15 Everytown's continued tracking of mass shootings also shows that LCMs are almost  
16 always used in the most deadly events. These include the shooting in San Bernardino,  
17 California, that resulted in fourteen deaths and twenty-two injuries; the massacre of forty-nine  
18 people and wounding of fifty-three more in a nightclub in Orlando, Florida; the attack in Las  
19 Vegas, Nevada in which the shooter used dozens of LCMs to fire hundreds of rounds into a  
20 concert crowd resulting in the death of fifty-nine people and the injury of over 500 more; and the  
21 attack on a church in Sutherland Springs, Texas that resulted in twenty-six deaths and twenty  
22 injuries.<sup>20</sup> Contrary to Plaintiffs' claims, (Pls.' Mem. at \*22-23), this record shows that mass  
23

24  
25  
26 <sup>18</sup> Because they are generally used together, assault weapons, serve as a reasonable, though  
27 underinclusive, proxy for LCMs. Everytown suspended comprehensively tracking magazine  
capacity after the 2013 report due to the difficulty of obtaining such data.

28 <sup>19</sup> An unpublished Everytown analysis of shootings since the 2017 report shows that, after  
including these shootings, the injury disparity jumps to nearly 50:1.

<sup>20</sup> See Everytown for Gun Safety, Appendix to *Mass Shootings*, at 3, 6; see Jackie Valley, *et al.*,  
*No Clear Motive in Las Vegas Strip Shooting That Killed 59, Injured 527*, Nevada Independent  
(Oct. 2, 2017), <http://bit.ly/2x4m4is>; Lia Eustachewich & Danika Fears, *Las Vegas Shooter Had*

1  
2 shooters clearly do not view carrying dozens of weapons with ten round magazines as a viable  
3 alternative to LCMs. Indeed, at least nine of the ten deadliest mass shootings in modern  
4 American history involved the use of a gun with an LCM.<sup>21</sup>

5 Mass shootings involving LCMs have a unique impact that the Court should consider  
6 when weighing the significant harm caused by LCMs. Indeed, mass shootings like those that  
7 occurred in Aurora, Sandy Hook, Tucson, Orlando, Las Vegas, and Sutherland Springs sear  
8 themselves into the national consciousness and affect the way people live their everyday lives.  
9 *See Alana Abramson, After Newtown, Schools Across the Country Crack Down on Security,*  
10 ABC News (Aug. 21, 2013), <http://abcn.ws/1KwN9Ls> (comparing the impact of the Sandy Hook  
11 shooting on school security to that of 9/11 on airport security and noting school districts have  
12 spent tens of millions of dollars on security improvements); *see also Friedman*, 784 F.3d at 412  
13 (noting that mass shootings “are highly salient”). While mass shootings on the scale of these  
14 tragedies remain statistically rare compared to the plague of everyday gun violence, their  
15 enormous impact reinforces the compelling justifications for New Jersey’s law.

16 **b. Social Science Research Shows LCMs Pose a Serious Risk to Public Safety.**

---

17  
18 *Cache of Weapons in Hotel Room*, New York Post (October 2, 2017), <https://nyp.st/2qCjqzj>;  
19 Jason Hanna & Holly Yan, *Sutherland Springs church shooting: What we know*, CNN.com  
(Nov. 7, 2017), <https://cnn.it/2HlsfV6>.

20 <sup>21</sup>Las Vegas, Nev. (58 Fatalities); Orlando, Fla. (49); Blacksburg, Va. (32); Newtown, Conn.  
21 (26); Sutherland Springs, Tex. (26); Killeen, Tex. (23); San Ysidro, Cal. (21); Austin, Tex. (18);  
22 San Bernardino, Cal. (14). *See* Violence Policy Center, *High Capacity Ammunition Magazines*  
23 *are the Common Thread Running Through Most Mass Shootings in the United States*,  
24 <https://bit.ly/2HnPC0k>. Information on the magazines used in the Texas Tower shooting in  
25 Austin, Tex. is unavailable, but the M1 Carbine used comes standard with a either a 15 or 30  
26 round box magazine. *See*. O. Ricardo Pimentel, *Nearly 50 Years Ago, Bravery at UT tower*,  
27 MySA.com (June 19, 2016), <https://bit.ly/2JAQu7s>; Frank Iannamico, *Design and Development*  
28 *of the U.S. Carbine Thirty Round Magazine*, Small Arms Review (May 13, 2013). The attack on  
Marjory Stoneman Douglas High School in Parkland Florida, which killed seventeen and injured  
at least fifteen people, involved the use of a Smith and Wesson M&P 15, which comes standard  
with a thirty-round magazine. Bart Jansen, *Florida shooting suspect bought gun legally, authorities say*, USA Today.com (Feb. 15, 2018), <https://usat.ly/2F9kBfH>. It has been reported  
that the shooter “abandoned at least six magazines that each contained 30 bullets at the scene of  
the shooting.” Paula McMahon, *Nikolas Cruz left 180 rounds of ammunition – with swastikas – at Parkland school, sources say*, Sun Sentinel (Mar. 2, 2018), <https://bit.ly/2IVjY09>. However,  
other sources reported that the shooter “went in with only 10-round magazines because larger  
clips would not fit in his duffel bag.” Nicholas Nehamas & David Smiley, *Florida School*  
*Shooter’s AR-15 May Have Jammed, Saving Lives, Report Says*, Miami Herald (Feb. 27, 2018),  
<https://hrld.us/2KQskUU>.

1  
2       Additional research supports the conclusion reached by the New Jersey Legislature that  
3 LCMs pose a significant danger to public safety. State prohibitions on LCMs are correlated with  
4 a 63% lower rate of shootings with three or more injuries or deaths. *See Sam Petulla, Here is 1*  
5 *Correlation Between State Gun Laws and Mass Shootings*, CNN.com (Oct. 5, 2017),  
6 <https://cnn.it/2J4sWCC> (noting Boston University Professor Michael Siegel's conclusion that  
7 “[w]hether a state has a [LCM] ban is the single best predictor of the mass shooting rate in that  
8 state”).

10       Likewise, several studies indicate that criminals are increasingly using LCMs in everyday  
11 violent crimes, as evidenced by the number of LCMs recovered by police. *See, e.g.*, Brian  
12 Freskos, *Baltimore Police Are Recovering More Guns Loaded With High-Capacity Magazines,*  
13 *Despite Ban on Sales*, The Trace (March 27, 2017), <http://bit.ly/2o1UQrr> (noting a more than 5%  
14 increase in the percentage of guns recovered with LCMs by Baltimore police from 2010 to 2016,  
15 despite Maryland's 2013 law prohibiting the sale or manufacture, but not the possession, of  
16 LCMs). Indeed, a recent study found that assault weapons and LCM-compatible firearms  
17 “appear to account for 22 to 36% of crime guns in most places, with some estimates upwards of  
18 40% for cases involving serious violence.” Christopher S. Koper et al., *Criminal Use of Assault*  
19 *Weapons and High-Capacity Semiautomatic Firearms: an Updated Examination of Local and*  
20 *National Sources*, 95 J. Urb. Health 313 (Oct. 2017), *available at* <https://bit.ly/2MRVqkd>. The  
21 rise in LCM use runs counter to the trend that existed during the federal LCM prohibition  
22 between 1994-2004 which researchers found was effective in reducing the use of LCMs by  
23 criminals. David Fallis, *Data Indicate Drop in High Capacity Magazines During Federal Gun*  
24 *Ban*, Washington Post, (Jan. 10, 2013), <http://wapo.st/2wV9EMX> (noting that the percentage of  
25 LCM-equipped guns recovered by Virginia police decreased during the federal LCM ban, but  
26 has more than doubled since its expiration in 2004).

27       Furthermore, when criminals use LCMs in violent crimes and shootings, they generally  
28 fire more shots and cause more injuries.<sup>22</sup> For example, a study of Milwaukee homicides found

---

<sup>22</sup> Christopher Koper, Daniel Woods & Jeffrey Roth, *An Updated Assessment of the Federal Assault Weapons Ban: Impacts on Gun Markets and Gun Violence, 1994-2003*, National Institute

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28  
that those killed with guns containing LCMs had on average one additional gunshot injury than when a gun without an LCM is used, and the Maryland medical examiner's office reported that the number of cadavers with ten or more bullets more than doubled between 2006 and 2016. *See, e.g.*, Jeffrey Roth & Christopher Koper, *Impact Evaluation of the Public Safety and Recreational Firearms Use Protection Act of 1994: Final Report*, Urban Institute, (1997), available at <http://urbn.is/2wQKkrA>; Justin George, *Shoot to Kill: Why Baltimore is One of The Most Lethal Cities in America*, Baltimore Sun (Sept. 30, 2016), <https://bsun.md/2da4nci>. And shootings with more injuries invariably lead to more deaths. One study found that gunshot victims shot twice are 60% more likely to die than those shot once. *See* Koper, *An Updated Assessment of the Federal Assault Weapons Ban: Impacts on Gun Markets and Gun Violence, 1994-2003*, *supra* note 23, at 87; *see also* Daniel W. Webster et al., *Epidemiologic changes in gunshot wounds in Washington, D.C. 1983-1990*, 127 Archives of Surgery 694 (1992) (finding that the fatality rate for multiple chest wounds is 61% higher than the fatality rate for a single chest wound). This finding is supported by the correlation between the prevalence of LCMs and increases in lethal shootings reported in several American cities. *See* Rachael Rettner, *Gunshot Wounds Are Getting Deadlier, One Hospital Finds*, LiveScience.com, June 14, 2016, <https://bit.ly/2HBnMO9> (asserting that increases in gunshot death rates could be connected to the use of LCMs).<sup>23</sup>

20 As Plaintiffs' own expert makes clear, LCMs also create the opportunity for a dramatic  
21 increase in the number of errant shots. (Kleck Decl. ¶ 12 ("people miss with most of the rounds  
22 they fire, especially under duress").) One recent study tracking stray-bullet shooting events found  
23 that during a one-year period there were 284 stray-bullet shooting events during which 317  
24 people were injured of which sixty-five died. Garen Wintemute, et. Al., *Epidemiology and  
25 Clinical Aspects of Stray Bullet Shootings in the United States*, 73 *J. of Trauma and Acute Care  
26 Surgery* 215 (2012). This is not a small concern in New Jersey, the most densely populated state  
27

---

28 of Justice (2004), <http://bit.ly/2vBTGTX> (finding that handguns associated with gunshot injuries are up to 50% more likely to have LCMs than handguns used in other crimes and that guns used in shootings resulting in injuries are nearly 26% more likely to have LCMs).

<sup>23</sup>*See also* George, *Shoot to Kill, supra* p. 16 (attributing increased shooting lethality, in part, to increasingly lethal tactics enabled by LCMs).

1  
2 in the country, where the victims of shootings are often not the intended targets. *See, e.g.*, Anna  
3 Merriman, *Bystander Killed in Trenton Standoff was Father of 6, Beloved Husband*, NJ.com  
4 (May 11, 2017), *available at* <https://bit.ly/2tSKVpL>; Myles Ma & Erin O'Neill, *Toddler was*  
5 *Bouncing on Parent's Bed When Killed by Stray Bullet Fired in Shootout*, NJ.com (Oct 13,  
6 2014), *available at* <https://bit.ly/2KMc9Iw.>; Dan Ivers, *Car Wash Employee Killed by Stray*  
7 *Bullet in Newark; Two Others Injured*, NJ.com (Oct. 12, 2014), *available at*  
8 <https://bit.ly/2KJFoeP>; *See generally* United States Census Bureau, 2010 Census: Population  
9 Density Data, *available at* <https://bit.ly/2z5jPRx> (indicating that New Jersey is the most densely  
10 populated state in the country).

12 Another study, conducted in California, indicates that assault pistols equipped with  
13 LCMs are more likely to be purchased by individuals with a criminal background. *See* Garen J.  
14 Wintemute, *et al.*, *Criminal Activity and Assault-Type Handguns: A Study of Young Adults*, 32  
15 Annals Emer. Med. 44 (1998), *available at* <http://bit.ly/2ymFodM> (finding assault pistols were  
16 selected by 2% of purchasers with no criminal record, 6.6% of purchasers with a prior gun  
17 charge, and 10.2% of purchasers with two or more previous violent felonies). And LCMs also  
18 pose a threat to New Jersey's law enforcement community; a recent analysis found that "LCM  
19 weapons overall account for 41% of the guns used to kill officers." *See* Koper, *Criminal Use of*  
20 *Assault Weapons and High-Capacity Semiautomatic Firearms*, *supra* p. 16, at 7.

21 In sum, Everytown's research makes clear that mass shootings involving LCMs are  
22 substantially more dangerous than those in which LCMs are not involved. This is further  
23 supported by research showing that LCMs increase the harms resulting from gun crime, even  
24 outside of the particularly tragic context of mass shootings.

25 **c. Plaintiffs' Attempts to Dispute this Evidence Are Unconvincing.**

26 The declaration submitted by Plaintiffs' expert, Professor Gary Kleck (hereinafter,  
27 "Kleck Decl.")—which is undermined by contradictions, clear methodological errors, and  
28

1  
2 impossibilities—fails to rebut these social-science findings. It should not be relied upon by this  
3 Court.<sup>24</sup>

4 Kleck, for example, asserts in his declaration that “in 1993 there were approximately 2.5  
5 million incidents in which guns were used for self-protection.” (Kleck Decl. ¶ 4.) But this  
6 figure, and the methodology used to derive it, have been repeatedly debunked.<sup>25</sup> As Dr. David  
7 Hemenway, Professor of Health Policy at the Harvard School of Public Health and director of the  
8 Harvard Injury Control Research Center has noted, Kleck’s “estimate is not plausible and has been  
9 nominated as the ‘most outrageous number mentioned in a policy discussion.’” Hemenway, *supra*, at  
10 66-68 (“It is clear that the claim of 2.5 million annual self-defense gun uses is a vast overestimate.”).  
11 In fact, the NRA – the parent organization of Kleck’s client – does not even credit his estimate,  
12 instead using a number more than three-times lower in its own advocacy materials. National  
13 Rifle Association (@NRA), Twitter (June 28, 2018, 10:07 AM), <https://bit.ly/2tZzBr9> (claiming  
14 760,000 annual defensive gun uses).<sup>26</sup>

17  
18 <sup>24</sup> Professor Kleck’s testimony was previously rejected by a Connecticut court, in a case  
19 involving a challenge to an assault weapons statute, because, the court found, he was “biased,”  
20 was “focused on the public debate,” and “did not help the inquiry of the court with respect to the  
21 legal claims.” *Benjamin v. Bailey*, No. CV 93-0063723, at 12-13 (Conn. Super. Ct. June 30,  
1994). The trial court’s decision was ultimately affirmed by the Connecticut Supreme Court.  
662 A.2d 1226 (Conn. 1995).

22 <sup>25</sup> See, e.g., Philip Cook, Jens Ludwig & David Hemenway, *The Gun Debate’s New Mythical  
23 Number: How Many Self-Defense Uses Per Year?*, 16 J. Pol’y Analysis & Mgmt. 43, 463-69  
24 (2007); David Hemenway, *Private Guns, Public Health* 66-68, 238-43 (2004); Violence Policy  
25 Center, *Firearm Justifiable Homicide and Non-Fatal Self-Defense Gun Use: An Analysis of  
Federal Bureau of Investigation and National Crime Victimization Survey Data*, at 4 (May  
2017), available at <https://bit.ly/2KAB0Qa>.

26 <sup>26</sup> Kleck also overestimates the frequency with which an armed victim is faced with multiple  
attackers, drawing his numbers largely from statistically insignificant samples and providing no  
analysis of the appropriateness of deadly force in those situations. (Kleck Decl. ¶ 18.) Thus, at  
least one study based on the FBI’s 2012 Supplemental Homicide Report found that in 2012,  
98.5% of the 259 justifiable homicides that were committed involved killing only one attacker  
and not a single incident involved killing more than three. Violence Policy Center, *Firearm  
Justifiable Homicides and Non-Fatal Self-Defense Gun Use* (June 2015) (In 2012 there were 255  
justifiable homicides with one killed, 4 with two killed and 2 with three killed). This statistic  
demonstrates the false premise underlying Plaintiffs’ contention that LCMs can be justified by  
the need to be able to defend oneself by gunning down numerous assailants.

1  
2       The methodology underlying one of the central arguments of Kleck's declaration,  
3 focusing on the average time per shot, is similarly unsound. Kleck takes the reported total length  
4 of each mass shooting, divides it by the number of rounds fired, and uses that average to argue  
5 that mass shootings are not impacted by the use of LCMs because on average a shooter could  
6 have reloaded between each shot. (Kleck Decl. ¶ 18.) This argument erroneously assumes, with  
7 no evidence, that mass shooters fire their gun at a completely consistent rates throughout the  
8 shooting rather than in bursts, interspersed between periods of movement or inactivity. As has  
9 been conclusively demonstrated elsewhere, this assumption cannot plausibly be credited. (See  
10 Declaration of Professor Daniel W. Webster, *Duncan v. Becerra*, No. 17-cv-1017-BEN-JLB, at ¶  
11 14 (S.D. Cal. June 5, 2017) (ECF Docket No. 15).)

12  
13       Kleck also contradicts himself on the ease of changing magazines. According to Kleck,  
14 for armed victims changing magazines is virtually impossible because “[u]nder the intense  
15 emotional stress of a crime victimization, when taken by surprise, the victim's hands are shaking,  
16 making it impossible for some victims to eject the expended magazine and insert a new one  
17 quickly.” (Kleck Decl. ¶ 18.) For criminals, however, Kleck asserts that being forced to reload,  
18 even in the chaotic atmosphere of a mass shooting, poses essentially no burden. (*Id.* at ¶ 22 (“it  
19 takes two to four seconds for shooters to eject an expended magazine from a semi-automatic gun,  
20 insert a loaded magazine, and make the gun ready to fire”).

21  
22       In reality, however, the pause after a mass shooter expends his ammunition and has to  
23 either reload or change weapons is critical for ending or escaping from attacks.<sup>27</sup> *See Kolbe*, 849  
24 F.3d at 128 (“[R]educing the number of rounds that can be fired without reloading increases the  
25 odds that lives will be spared in a mass shooting.”); *Heller II*, 670 F.3d at 1264 (noting evidence  
26 that “the ‘2 or 3 second pause’ during which a criminal reloads his firearm ‘can be of critical  
27  
28

---

<sup>27</sup> And, despite Plaintiffs' contentions, there is no evidence that “the pause to reload adversely affects one's success in self-defense.” *Colo. Outfitters Ass'n v. Hickenlooper*, 24 F. Supp. 3d 1050, 1071 (D. Colo. 2014), vacated on standing grounds, 823 F.3d 537 (10th Cir. 2016).

1  
2 benefit to law enforcement’’’). During April’s mass shooting at a Waffle House in Tennessee,  
3 for example, a bystander intervened during a pause in firing by grabbing the attackers AR-15 and  
4 ending the shooting. Alan Blinder, *‘I Just Wanted to Live,’ Says Man Who Wrested Rifle From*  
5 *Waffle House Gunman*, N.Y. Times, April 23, 2018, available at <https://nyti.ms/2I03Cxs>. At  
6 Seattle Pacific University in 2014, students tackled a gunman while he was reloading, thus  
7 ending the shooting. Kelsey Mallahan, *Timeline: Seattle Pacific University Shooting*, K5 News,  
8 June 24, 2016, available at <https://kng5.tv/2m22501>. In 2011, bystanders were able to disarm the  
9 shooter at a constituent event in Tucson, Arizona when the shooter was forced to pause and  
10 reload. *Congresswoman’s Responses after Arizona Shooting Called Encouraging*, CNN.com,  
11 Jan. 9, 2011, available at <https://cnn.it/2NrEiD0>. And during the mass shooting at an elementary  
12 school in Newtown, Connecticut, “nine children were able to run from a targeted classroom  
13 while the gunman paused to change out a large-capacity thirty-round magazine.” *Kolbe*, 849  
14 F.3d at 128. These examples make clear that “limiting a shooter to a ten-round magazine could  
15 ‘mean the difference between life and death for many people.’” *Id.*

16 In short, Everytown’s research, along with the other support that the Defendant has  
17 introduced into the record, supports the State’s position that A2761 is important legislation that  
18 is, as a matter of law, appropriately tailored to address the significant public safety threat  
19 presented by LCMs and that it is therefore constitutional. Nothing in Kleck’s declaration  
20 undermines that legal reality.

## **CONCLUSION**

For the foregoing reasons, Everytown respectfully requests that the Court deny Plaintiffs' motion for a preliminary injunction.

Dated: July 6, 2018

Respectfully submitted,

By: /s/ Lawrence S. Lustberg

Lawrence S. Lustberg, Esq.  
GIBBONS P.C.  
One Gateway Center  
Newark, New Jersey 07102  
(973) 596-4500  
llustberg@gibbonslaw.com

*Attorneys for Amicus Curiae  
Everytown for Gun Safety*